

October 14, 2018

Honorable Richard M. Berman
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007-1312

United States v. Usher et al., 17 Cr. 19 (RMB)

Dear Judge Berman:

We respectfully write in connection with Your Honor's email this afternoon, and wish to clarify the Court's Order that witnesses, including experts, are excluded from "observing the trial until their testimony is completed." We currently anticipate calling our experts to offer opinions based on the evidence presented at trial, which would include trial testimony, to respond to the Government's case. Accordingly, we seek clarification from the Court as to whether expert witnesses would be permitted to watch the proceedings from the overflow room on the 15th floor. We would take care to keep our experts out of the view of the jury at all times. Permitting experts to watch the proceedings has been endorsed by the Second Circuit, *see, e.g., Malek v. Fed. Ins. Co.*, 994 F.2d 49, 54 (2d Cir. 1993) (reversing judgment where sequestered expert "was not 'a fact witness whose recollection might have been colored' by the testimony of other witnesses; rather, he was an expert whose assistance was important to the presentation of plaintiffs' case and who should have been permitted to remain in the courtroom"), and in this case, would be more efficient than for expert testimony to be presented through hypotheticals. *See also* Fed. R. Evid. 615(c) (excepting from exclusion "a person whose presence a party shows to be essential to presenting the party's claim or defense"); *see also* Adv. Cmtee Notes ("The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.") (emphasis added).

We would also note that we had consented to the Government's request to have their testifying agent observe the openings statements. We have provided our two experts with certain portions of the trial record, but seek guidance as to whether we can continue to provide them with relevant parts of the trial transcript, especially the upcoming expert testimony of Mr. Tilsner.

We would be happy to discuss this issue with the Court at 8:15 am before the proceedings begin on Monday, or at any other time convenient for the Court.

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Sincerely,

/s/ Mark Gidley

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